Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 290

RICE LAKE CREAMERY COMPANY,
Petitioner,

vs.

GENERAL DRIVERS & HELPERS UNION, LOCAL NO. 662, affiliated with the INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN & HELPERS OF AMERICA,

and

NATIONAL LABOR RELATIONS BOARD,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

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INDEX

	PAGE
Opinions below	2
Jurisdiction	2
Statute involved	2
Questions presented	2
Statement of facts	3
1. The multiple employer negotiations	3
2. The individual negotiations	7
3. The December applications	9
The issues litigated	10
The Board's order	12
The opinion below	14
Reasons for granting writ	15
1. Petitioner was denied due process of law when the Board predicated its order on unfair labor practices not alleged in the complaint nor litigated at the hearing	15
a. The critical importance of the June 20 finding	15
b. The denial of due process	17
c. The Board's June 20 finding is unsupported by substantial evidence	18
d. The Board finding that Petitioner was chargeable with the alleged refusal on June 20 was erroneous as a matter of law	21

PAGE

2. The Board's and the Court's finding that there was a causal connection between the strike on June 22 and the June 20 Turtle Lake incident is contrary to all of the facts in the record 24

3. The Board finding that in December of 1958 the strikers made an unconditional offer to return to work was erroneous as a matter of law 26

4. The decision of the Court below is in conflict with prior decisions of this Court and with the decisions of other Circuits, and calls for the exercise of this Court's supervisory authority 27

Conclusion 28

Appendices 1a-11a

I. Court's opinion 2a

II. Judgment 9a

III. Statutes 10a

CITATIONS

Cases

Ballston-Stillwater Knitting Co., Inc. v. NLRB, 98 F. (2d) 758, p. 760 (2nd Cir.) 25

Boeing Airplane Co. v. NLRB, 140 F. (2d) 423, p. 433 (10th Cir.) 25

Consolidated Edison Co. v. NLRB, 305 U.S. 197 17

Farmers Cooperative Co. v. NLRB, 208 F. (2d) 296, p. 299 (8th Cir.) 25

Martell Mills Corp. v. NLRB, 114 F. (2d) 624, pp. 627, 628 (4th Cir.) 25

Morgan v. U. S., 304 U.S. 1 17

PAGE

Oklahoma Furniture Mfg. Co., (1953) 104 NLRB 771 .. 27

Pittsburgh-Des Moines Steel Co. v. NLRB, 284 F. (2d) 74, p. 87 (9th Cir.) 25

Quaker State Oil Refining Corp. v. NLRB, 119 F. (2d) 631, p. 632 (3rd Cir.) 25

Scott Paper Box Co., (1949) 81 NLRB 535 27

U. S. Steel Corp. v. NLRB, 196 F. (2d) 459, p. 464 (7th Cir.) 25

Universal Camera Corp. v. NLRB, 340 U.S. 474 25

Winter Garden Citrus Produets Cooperative v. NLRB, 238 F. (2d) 128, p. 129 (5th Cir.) 25

NLRB v. Bradley Washfountain Co., (1951) 192 F. (2d) 144 (7th Cir.) 16, 17

NLRB v. Fletcher, 298 F. (2d) 594, (1st Cir.) 17, 18

NLRB v. Fulton Bag & Cotton Mills, 175 F. (2d) 675 (5th Cir.) 17

NLRB v. Jackson Press, Inc., 201 F. (2d) 541, p. 546 (7th Cir.) 25

NLRB v. Kanmak Mills, 200 F. (2d) 542 (3rd Cir.) 17

NLRB v. Ohio Calcium Co., (CA-6, 1943), 133 F. (2d) 721 16

NLRB v. Scott & Scott, 245 F. (2d) 926, p. 929-930 (9th Cir.) 25

NLRB v. James Thompson & Co., 208 F. (2d) 743, p. 749 (2nd Cir.) 25

PAGE

Miscellaneous.

U. S. Const., Amend. V 2

Statute

National Labor Relations Act, as amended, (61 Stat. 135, 29 U.S.C. 151, *et seq.*):

Section 7 ..... 10a

Section 8(a)(1) 2

Section 8(a)(3) 2

Section 8(a)(5) 2, 14

Section 8(d) 11a

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RICE LAKE CREAMERY COMPANY,
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GENERAL DRIVERS & HELPERS UNION, LOCAL NO. 662, affiliated with the INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN & HELPERS OF AMERICA,

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NATIONAL LABOR RELATIONS BOARD,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioner, Rice Lake Creamery Company, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in the above-entitled matter on May 3, 1962.

Such judgment affirmed the decision and order of the National Labor Relations Board holding that Petitioner violated Sections 8(a)(1), 8(a)(3), and 8(a)(5) of the National Labor Relations Act, as amended, and ordered that said order of the Board be enforced. The decree of said Court enforcing the order of the Board was filed on June 11, 1962.

OPINIONS BELOW

The opinion of the Court of Appeals (Cases Nos. 16470 and 16505) is not yet reported and is printed herein. (App. pp. 2a-7a)

JURISDICTION

The judgment of the Court of Appeals was entered on May 3, 1962. (App. p. 9a). Jurisdiction of this Court is invoked under 28 U.S.C. section 1254(1).

STATUTE INVOLVED

The pertinent revisions of the National Labor Relations Act are set forth herein. (App. pp. 10a-11a).

QUESTIONS PRESENTED

1. Whether Petitioner was denied due process of law contrary to the Fifth Amendment to the Constitution of the United States when the National Labor Relations Board predicated its order on findings, not alleged in the complaint or litigated at the hearing, that Petitioner unlawfully refused to bargain with the Union during the period from June 20 through June 24, 1958, which findings and order were affirmed by the Court below.

2. Did the Court below err in affirming the Board's findings that the June 22, 1958 strike was caused and prolonged by unfair labor practices, and that the strikers in December of 1958 unconditionally offered to return to work?

STATEMENT OF FACTS

1. The Multiple Employer Negotiations.

The Union was certified as the collective bargaining agent for certain of Petitioner's employees on May 8, 1952. Petitioner, since such date, has negotiated and executed a series of collective bargaining agreements, the last one of which expired on May 31, 1958 (J.A. 13).[1] On March 24, 1958 the Union served written notice on Petitioner of its desire to negotiate a new agreement (J.A. 14). At the same time, the Union served similar notices on fifteen other dairies. On April 14 the Union requested these dairies and Petitioner to enter into joint negotiations, and forwarded to all employers identical contract proposals. On April 24 Torrison, an attorney presumably selected by eleven of the employers in the group, excluding Petitioner, informed the Union that unless the other employers voluntarily wished to join in the joint bargaining, *their representatives* would not be included in the negotiations (J.A. 15). There is no evidence that Petitioner employed Torrison to perform any service on its behalf.

On April 29 Torrison forwarded to the Union a proposal and advised the Union: "No company joining in the negotiations binds itself to accept the results, and the negotiating team will have no authority to commit members. All agreements, consequently, will be subject to ratification by the individual employers" (J.A. 16). Shortly

[1] The reference "J.A." is to the page number appearing at the top of the page of the Joint Appendix printed for the use of the Court below, nine copies of which have been filed in accordance with par. 4, Rule 21. Where there is no contest as to the findings made by the Board, reference is made to the findings of the Trial Examiner which were affirmed by the Board. The Trial Examiner's findings of fact appear at J.A. 12 through 76.

thereafter, Cameron, Petitioner's attorney, advised Torrison that Petitioner would go along with the group negotiations, but pointed out that due to different problems and different plants it would be impossible to get a uniform contract, but that Petitioner would go along with the rest of the industry insofar as agreeing upon a pattern is concerned (J.A. 16, 17). Torrison later informed the Union that Petitioner would participate in group negotiations (J.A. 17). At the first negotiating meeting with the Union on May 8, Torrison informed the Union that "this committee has authority to agree to the contract proposals which have just been submitted to you. Beyond that, this negotiating committee has no authority to commit its principals but it has been instructed to report back on any clauses where there is any area of disagreement and to make recommendations to the policy committee." (J.A. 18). Veleke, the chief Union negotiator, announced at the meeting that anything stated by him during negotiations would not be final as he and the Union bargaining committee reserved the right to change their views at any time during negotiations (J.A. 18). Since Petitioner was not represented at the May 8 meeting, two Union agents called on Cameron on May 16, at which time the Union agents were informed that Torrison was *not* working for Petitioner and that Cameron was handling Petitioner's interests in the group negotiations (J.A. 18-19). Subsequent group meetings were held on May 20, May 26, and May 29. On the latter date the employers submitted another counterproposal (J.A. 19-20). Cameron also proposed to Union agent Martin that if he would agree to certain exceptions to the group negotiations and the Union would agree to them in addition to the results of group negotiations, Petitioner and the Union would have an agreement. Martin refused (J.A. 21). At the May 29 meeting, held under the auspices of a State mediator, an agreement was reached on wages (J.A. 20).

At a meeting held on June 10 the mediator made additional efforts to resolve the disputed items, without success (J.A. 22). During another negotiating session on June 19, the Union submitted a further counterproposal which demanded an additional 5¢ per hour wage increase. Some time after the Union had submitted its counterproposal, the employer committee informed the mediator that they did not care to meet further with the Union, as they had nothing further to discuss (J.A. 23). At about 1:30 p.m., while the mediator was still trying to bring about an agreement between the parties, the Union ordered a strike at the Turtle Lake Creamery, without informing the mediator or the employer negotiators who were still at the meeting place (J.A. 278, 279). A strike was also called at Clear Lake on June 20 and at Baldwin on June 21 (J.A. 23).

During the period between May 29 and June 10 the Union had tried to negotiate separate contracts with various members of the group, submitting proposals different than those submitted to the negotiating committee (J.A. 46).

On the night of June 20 the mediator attempted to get the parties together at Turtle Lake in the evening since there was an indication that *Turtle Lake* wanted to settle. The full board of the Turtle Lake Creamery was present as well as Torrison. The conciliator met with the employer group from approximately 8:00 p.m. until midnight. At about midnight, according to Veleke, the Union negotiator, Anderson, the mediator, reported that Torrison had informed him "that if the men went back to work they would talk." (J.A. 185). Petitioner was not represented at the Turtle Lake meeting (J.A. 372).

On the following day, June 21, the Union agents visited Petitioner's plant in the afternoon and requested indi-

vidual negotiations on the contract. At this meeting Union agents also told Petitioner that they would not stand for Petitioner accepting milk from the Turtle Lake plant. The Union was informed that Petitioner would not stop taking Turtle Lake milk and that Petitioner would not bargain on an individual basis, as it was negotiating with the group (J.A. 24). Immediately after the meeting broke up, Petitioner posted on its bulletin board a notice to employees to the effect that it intended to operate the plant if the Union called a strike and that it would hire replacement employees (J.A. 25). That evening Veleke the chief union agent, told the Union steward at Petitioner's plant that if there was a strike it was because Petitioner would not stop taking Turtle Lake milk (J.A. 306). The strike was ordered for 6:00 a.m. Sunday, June 22, 1958, at which time 25 of the 39 employees in the bargaining unit went out on strike (J.A. 14, 26).

There is no evidence of any further request for negotiations by the Union until June 24.

On the afternoon of June 24 Cameron, during the course of a meeting with a number of dairy representatives, telephoned Veleke and made a contract proposal over the phone. Veleke would not accept the proposal over the phone and suggested that they sit down and talk about it, to which Cameron replied he would call him back. Cameron then telephoned the mediator, advising him of the developments and asked the mediator to attend a meeting that night (J.A. 27). At the negotiations initiated by Cameron an agreement was finally reached early in the morning of June 25 between the Union and the employer committee group (J.A. 28).

2. The Individual Negotiations.

At the request of the mediator, Cameron met with the mediator and Union representatives in his office on the afternoon of June 25. The meeting continued into the 26th. No agreement was reached, but the Union agreed to submit Petitioner's proposals to the Union membership that night. The strikers voted to reject Petitioner's proposal mainly because of the lack of a straight union shop and the continuance of existing job classifications (J.A. 29). Strikes at the other three plants were terminated on June 25 (J.A. 30). The mediator arranged a further meeting between the Union and Petitioner for July 7, which meeting continued into the 8th (J.A. 31). In the afternoon of July 8 Petitioner submitted to the Union a complete contract proposal, to which the Union submitted a counter-proposal which provided for a continuance of the modified union shop, provided that Petitioner recommend that 7 non-union employees join the Union (J.A. 32). Cameron made a further cross-proposal agreeing to continue the modified Union shop, but refused to recommend that any employees join the Union, and made proposals on other remaining issues. The cross-proposals, in effect, left the parties still in dispute over Petitioner's refusal to recommend that 7 employees join the Union, the method of handling the driver-salesmen, the amount of payments under the health and welfare plan, the scope of the non-discrimination clause, and the exemption of seasonal employees from Union membership (J.A. 32, 33). Petitioner's proposal was submitted to the strikers that night, who rejected it because they did not like the modified union shop or Petitioner's refusal to persuade all non-union employees to join the Union (J.A. 33).

On the morning of July 9, Veleke telephoned Cameron and advised him that he might be able to sell Petitioner's

proposal if Petitioner would recommend that the 3 non-union firemen join the Union. That afternoon Veleke was advised by letter that Petitioner would not compel any employee to join the Union and that the offer of the previous day had been withdrawn (J.A. 33).

A further negotiations meeting took place on July 25 and lasted into the evening, again with the mediator. After the meeting had broken up, the mediator proposed a settlement agreement, which Cameron agreed to recommend to Petitioner's officers who had previously left the negotiations (J.A. 35). Cameron submitted the proposal to Petitioner's officers and advised them that it was his understanding that under the agreement, all of the striking employees would have to be rehired (J.A. 37). At a later meeting between Union representatives, Petitioner's officials, and Cameron, there was a further discussion concerning the rehiring of the strikers, at which time Petitioner informed the Union that they saw no reason why they should take back any of the strikers, because the new employees hired were satisfactory (J.A. 38).

A further negotiations meeting took place on August 28, at which time Petitioner again advised that there was no pending proposal from Petitioner and that any agreement would have to be worked out from scratch. Cameron advised the Union that any agreement would have to exclude union security, checkoff, seniority, the maintenance of standards, protection of rights, and successorship clauses, but that the economics of the contract was no problem (J.A. 38). The Union took the position that all of the strikers would have to be rehired without loss of seniority, to which Petitioner responded that they might take back 4 to 6 strikers to fill any jobs available, and that Petitioner was not interested in the rest of the strikers (J.A. 39). The Union thereupon reverted to its original

proposal submitted prior to the joint negotiations and the parties proceeded to discuss the first 19 articles of said proposal (J.A. 39). In a letter dated September 10 Petitioner advised the Union that it would decline to recognize and bargain with the Union, "unless and until adequate proof is submitted that a majority of the eligible employees really want Local No. 622 to be their bargaining representative." (J.A. 40).

3. The December Applications.

On the morning of December 2 a group of the strikers signed up for unemployment compensation at the City Hall at Rice Lake. They were instructed by the business agent to go down to the plant and apply for their jobs back, and understood that the purpose of the application to go back to work was to qualify for unemployment compensation. They were not informed that the strike was over and continued to receive strike benefits until the date of the hearing (J.A. 315). Later that day a group of the striking employees went into Petitioner's office and asked to see two of Petitioner's officers. They were informed by the office manager that Petitioner's officers were not in. DeBoer, the Union steward, then informed the office manager that the strikers were there to apply for their jobs and would go back to work as a *group*, and that all of the strikers were available to go to work *then*. The office manager replied that she had nothing to do with the hiring of male employees and that they should see either Ervin or Harry Gerland (J.A. 40). The strikers, upon leaving the office, resumed picketing (J.A. 304).

DeBoer received a letter dated December 3 from Cameron inquiring if the employees' application meant that the strike was over and if the offer was an offer by each individual employee to return to work. Cameron instructed DeBoer that if any of the strikers wanted to

make application, they should see either Harry or Ervin Gerland (J.A. 41). Thereafter, in a letter dated December 19, drafted by the Union, DeBoer advised Cameron that the application of December 2 "was made on behalf of the striking employees unconditionally, and the offer still stands at this time," and advised Cameron to seek the advice of the Union as to whether the strike had been terminated (J.A. 41, 42). No response was made to this letter. None of the strikers applied to Petitioner for work nor had any been recalled at the time of the hearing.

THE ISSUES LITIGATED

The complaint alleged that beginning on or about May 8 Petitioner had entered into negotiations with a fixed intention and determination not to arrive at a collective bargaining agreement, and engaged in conduct calculated to accomplish that result (par. 10(a)); refused to be bound by the results of multi-employer negotiations, notwithstanding the fact that because of participation in multi-employer negotiations, Petitioner declined to engage in individual negotiations (par. 10(b)); withdrew from employer negotiations on June 24 (par. 10(c)); repeatedly repudiated agreements made by Cameron after June 25, 1958 (par. 10(d)); failed to invest Cameron with sufficient bargaining authority (par. 10(e)); repeatedly withdrew proposals made by Cameron (par. 10(f)); continually changed and shifted its position (par. 10(g)); and posted the June 21 notice (par. 10(h)). (J.A. 393, 394).

The complaint further alleged that Petitioner discharged Harry DeBoer on August 28 because of his union activities (par. 12, J.A. 394); and that on December 2 and on December 19, 1958 Petitioner refused to reinstate the strikers upon their *unconditional* application for reinstatement (par. 13, J.A. 394, 395).

It was also alleged that the strike which began on June 22 was caused by and has been prolonged by the unfair labor practices, *as alleged in the complaint* (par. 15, J.A. 395).

Petitioner filed an answer to the complaint admitting certain allegations and denying others, and denying that it had committed any unfair labor practice (J.A. 397-401).

At the outset of the hearing Petitioner's counsel requested that he be advised as to the act or acts alleged in the complaint to have caused the strike. After a long colloquy during which the specific allegations of the complaint were considered, the Trial Examiner denied Petitioner's motion, asserting that it could be renewed after the General Counsel had put in its case in chief. During this colloquy there was no reference by *anigone* to any claim of an unfair labor practice on June 20 at Turtle Lake which caused the strike on June 22 (J.A. 91-100). During this colloquy Petitioner asserted: "It is a fundamental principle of proper procedure and fair play that the defendant be informed as to what he is charged with as to the cause of the strike because they allege it is an unfair labor practice strike, and that is the key issue in this proceeding." (J.A. 94). During the colloquy the Trial Examiner conceded that he was not clear as to the meaning of the complaint and the General Counsel shifted its position several times as to what was intended by the complaint (J.A. 94, 95, 98, 100).

Upon the completion of the General Counsel's case in chief, Petitioner renewed its request to be informed as to the specific act or acts the General Counsel claimed was the cause of the strike on June 22 (J.A. 319). The response was that the evidence showed that the whole group was refusing to bargain, "particularly in view of the recalcitrant attitude in the June 10 and June 19 meetings,

and with particular reference to the June 19 meeting when during the afternoon session they declined to meet at all." (J.A. 320). The understanding was then confirmed with the Trial Examiner that the General Counsel was claiming a refusal to bargain on June 10 and June 19 (J.A. 321). Later in the proceedings Petitioner moved to dismiss the allegation in the complaint to the effect that the strike was an unfair labor practice strike at the outset (J.A. 328). In the colloquy which followed it was indicated clearly that the only issue which remained with respect to the cause of the strike of June 22 was whether or not there was a refusal to bargain on June 19 (J.A. 328-331). *No reference was made at any time to any incident on June 20 at Turtle Lake.*

As noted by the Court below, only the General Counsel, in the briefs filed with the Trial Examiner, "made a passing reference to the June 20 incident at Turtle Lake."

THE BOARD'S ORDER

The Board dismissed paragraphs 10(a), (b), and (c) of the complaint insofar as they related to the purpose and extent of Petitioner's participation *in the multi-employer bargaining* (J.A. 52). Paragraph 10(d) relating to the repudiation of agreements made by Cameron, and paragraph 10(e) relating to Cameron's lack of sufficient negotiation authority, were also dismissed (J.A. 61). Paragraph 10(h) alleging that the June 21 notice was a refusal to bargain was also dismissed (J.A. 57).

The Board found that the General Counsel had "failed to sustain the ultimate burden of proving his contentions by a preponderance of substantial testimony in the record considered as a whole," (J.A. 51, 52), and granted the motion to strike paragraphs 10(a) "insofar as it relates to the purpose and extent of Respondent's participation

in the multi-employer bargaining, and subparagraphs (b) and (c)." (J.A. 52). The Board also found that "under all these circumstances, I cannot conclude or find that the group negotiators, or Respondent as one of their principals, were guilty of bad faith bargaining on June 19th." (J.A. 53).

With the dismissal of paragraph 10(a) of the complaint, as it related to multi-employer bargaining, and the dismissal of paragraphs 10(b), (c), (d), (e), and (h) of the complaint, the only issue as to bargaining that remained was the claim that Petitioner repeatedly withdrew collective bargaining proposals made by Cameron (par. 10(f)), and continually changed and shifted its position (par. 10(g)).

Notwithstanding this posture of the litigation with respect to the bargaining, the Board found that "when the group negotiators advised the Union at the meeting of June 20 at Turtle Lake that they would talk further with the Union if the strikers returned to work and no joint discussions took place after the Union refused to call off the strike, the employers indulged in bad faith bargaining and Respondent [Petitioner] is chargeable therewith." (J.A. 54).

While the Board found that the strikes at Baldwin, Clear Lake, Turtle Lake, and Rice Lake were called as part of a *prearranged* plan of the Union to strike all of the plants in order to build up pressure to compel them to reach an agreement and were economic in origin (J.A. 54), it found "the inability of the Union to secure an agreement on the 20th, which *caused* the strike at Turtle Lake, arose directly from the employers' unlawful refusal to meet with the Union on that date. As the Union refused to call off the strike on that date, it is clear that the unfair labor practice was a direct cause of prolongation

of the Turtle Lake strike, and converted it into an unfair labor practice strike * * *," and that the refusal was a direct cause of the strike at the other three plants, with the result that the strike on June 22 at Petitioner's plant was an unfair labor practice strike from the outset (J.A. 54, 55).

The unfair labor practices relating to subsequent events were based on this finding (J.A. 14, 55, 70, 74).

THE OPINION BELOW

The Court below found, with respect to the June 20 incident, that "the refusal of Respondent through its negotiators to meet with the Union unless and until it ended the [Turtle Lake] strike was a clear refusal to bargain, in violation of Section 8(a)(5) of the Act." (App. pp. 3a-4a).

The Court further found, in conflict with the findings of the Board and the Trial Examiner, that "on June 19 the group committee refused to negotiate further and the Union called a strike against the Turtle Lake dairy, one member of the group." (App. p. 3a).

The Court, adverting to the fact that strikes were called on the 19th, 20th, 21st, and 22nd, after the *assumed* refusals of the group negotiators to bargain on June 19, found that "it is reasonable to infer from this that there was a causal connection and not a mere accidental coincidence between the refusals and the strikes."

The lower Court also held that because the complaint alleged that Petitioner "entered into negotiations with the Union on or about May 8 with a fixed intention and determination not to arrive at a collective bargaining agreement, and throughout the course of subsequent negotiations engaged in conduct calculated to accomplish that result, the unfair labor practice based on the June 20 Turtle Lake incident was within the scope of the complaint." (App. p. 7a).

REASONS FOR GRANTING WRIT

1. Petitioner Was Denied Due Process of Law When the Board Predicated Its Order on Unfair Labor Practices Not Alleged in the Complaint Nor Litigated at the Hearing.

a. The Critical Importance of the June 20 Finding.

As the Board so pointedly found: "The strike was an unfair labor practice strike *only* because of Respondent's vicarious refusal to bargain in the joint negotiations on June 20." (J.A. 57). If that finding is invalid, the strike was an economic strike at its inception, which gave Petitioner the right to replace the striking employees, at least until the strike was converted to an unfair labor practice strike by some subsequent unfair labor practice which, at least in part, caused the strike to be prolonged.

In Petitioner's answer to the complaint, it denied that the Union represented the majority of the employees after June 23 (J.A. 397). The Board found that the Union continued its majority status, at least through September 10, basing its finding on the legal conclusion: "that the strike was caused by unfair labor practices of Respondent and all strikers continued as employees within the meaning of the Act." (J.A. 14, 70). The Board's findings and order, therefore, are hinged on two essential findings: (1) that Petitioner committed an unfair labor practice on June 20, and (2) that such unfair labor practice was a cause of the strike. If these findings fail of support, the whole structure supporting the Board's order crumbles.

The strike started on June 22. On June 24 and 25 the Union and the employer group reached a tentative area agreement. On June 25 and 26 Petitioner negotiated with the Union with respect to the individual issues that re-

mained. The Board found: "no evidence of bad faith bargaining by Respondent on the 25th or the 26th when Cameron explained Respondent's position on the five items to the employees themselves. These actions are more consistent with good faith, rather than bad faith, bargaining." (J.A. 62). The parties made a further attempt at reaching an agreement on July 7 and 8 and Petitioner made a further proposal to the Union on July 8, which offer was again rejected by the Union membership. The Board found that when Petitioner on July 9 withdrew the offer made the day before, it engaged in bad faith bargaining (J.A. 63).

The unimpeached evidence in the record shows that on July 9 and thereafter the Union did not represent a majority of the employees in the bargaining unit. As of that date, 14 of the 39 employees in the unit on June 22 were going to work through the picket line, and 12 of the 25 strikers had been replaced. The jobs of 3 other strikers had been eliminated, reducing the unit to 36 employees (J.A. 519). It is clear, therefore, that as of July 9 a majority of the employees had rejected the Union as their bargaining agent, with the result that Petitioner had no obligation under the Act to bargain with the Union. *NLRB* v. *Ohio Calcium Co.*, (CA-6 1943), 133 F. (2d) 721; *NLRB* v. *Bradley Washfountain Co.* (CA-7 1951), 192 F. (2d) 144.

It is apparent, therefore, that absent a supported finding that Petitioner refused to bargain with the Union on June 20, which refusal, at least in part, caused the strike at Petitioner's plant on June 22, the Board's findings and order as to the unfair labor practice strike fails completely of support, and are invalid, as a matter of law.

b. The Denial of Due Process.

A finding of an unfair labor practice may not be sustained where the unfair labor practice was not charged in the complaint or litigated. *Consolidated Edison Co. v. NLRB*, 305 U.S. 197:

> "The right to a hearing embraces not only the right to present evidence but also a reasonable opportunity to know the claims of the opposing party and to meet them." *Morgan v. U. S.*, 304 U.S. 1.

> "Where the Board improperly makes its findings on a charge not properly contained in the complaint, and the record discloses that the basis of this finding has not been litigated at the hearing, such finding is not entitled to enforcement." See, *NLRB* v. *Bradley Washfountain Co.*, 192 F. (2d) 144, 7th Cir. (1951); *NLRB* v. *Fletcher*, 298 F. (2d) 594, 1st Cir.; *NLRB* v. *Fulton Bag & Cotton Mills*, 175 F. (2d) 675, 5th Cir.; *NLRB* v. *Kanmak Mills*, 200 F. (2d) 542, 3rd Cir.

The Trial Examiner found that the matter of the June 20th refusal to bargain "was fully litigated and constituted a proper basis for a finding and conclusion herein." (J.A. 54, Note 26). Petitioner excepted to this finding, as well as to the finding that there had been a refusal on June 20 (J.A. 535). The Board adopted the Trial Examiner's finding, finding no prejudicial error (J.A. 5). The question of due process was again argued before the Court below. *The Court below found that the allegation in the* complaint that Petitioner *entered* into negotiations with a fixed intention not to arrive at a collective bargaining agreement and engaged in conduct calculated to accomplish that result gave Petitioner notice that it was charged with an *absolute* refusal to bargain on June 20 (App. p. 3a). It is respectfully submitted that an allegation asserting that Petitioner *entered* into negotiations is not notice of a claim that Petitioner *refused to enter* into negotiations.

Petitioner, in an attempt to avoid just this type of situation, specifically requested, at the outset of the hearing and again at the close of the General Counsel's case that it be advised of the act or acts claimed to have caused the strike. The General Counsel at the hearing gave no indication of any claim that anything that happened at Turtle Lake on June 20 was a factor in the strike at any of the plants. Obviously, had Petitioner any notice that the Turtle Lake meeting was an issue in the case, it would have been an easy matter to produce witnesses in attendance at the Turtle Lake meeting to rebut the freewheeling, unresponsive, double hearsay testimony ultimately relied upon by the Board and, presumably, the Court below. Petitioner was given no such notice or opportunity to meet such a claim. In a case involving back pay extending over a period of almost four years for 5/8 of Petitioner's normal work force, it derogates elemental concepts of procedural due process to grant enforcement based on a finding neither presented nor litigated. *NLRB* v. *Fletcher Co.*, 298 F. (2d) 594, p. 600.

The Court below apparently relied upon the fact that the General Counsel, in briefs filed with the Trial Examiner, made a *passing reference* to the June 20 incident at Turtle Lake (App. p. 7a), as proof that the issue was litigated. After the hearing, not only was Petitioner denied any opportunity to meet such a claim with testimony, but under the Board's rules was even prevented from filing a reply brief with the Trial Examiner.

c. The Board's June 20 Finding Is Unsupported by Substantial Evidence.

The Board properly found that the General Counsel failed to sustain the allegation in its complaint, "insofar as it relates to the purpose and extent of Respondent's participation in the multi-employer bargaining." (J.A. 52).

It is submitted that if this finding is correct, its finding as to the June 20 incident cannot be sustained.

There is absolutely no evidence or finding that on June 20, Petitioner was trying to avoid its collective bargaining obligation. The evidence, in fact, is to the contrary.

Petitioner, since 1952, had negotiated agreements with the Union and agreed to go along with group negotiations in 1958 at the Union's request, although it had no obligation to do so. At the May 29 meeting it offered to go along with whatever agreement the group reached, provided the Union recognized and accepted certain exceptions. The Board not only found that there was no animosity between Petitioner and the Union during a six-year relationship (J.A. 48), but that actually the steps taken by Cameron on June 24 helped break the *existing impasse* and paved the way for the June 25 settlement (J.A. 50, 51). The later proposals Petitioner made, which were rejected by the Union on June 26 and July 8, hardly indicate an intent to avoid reaching an agreement.

It is obvious that Veleke, the Union representative, did not assume that *Petitioner* was refusing absolutely to bargain with the Union, since he journeyed to Rice Lake on the afternoon of *June 21* to engage in bargaining with Petitioner. Veleke specifically informed his Union steward, DeBoer, on the afternoon of the 21st that the employer committee had refused to bargain any further on *June 19* (J.A. 307). Significantly, Veleke made no reference to June 20 in his discussion with the Union steward on June 21.

The June 20 finding is based completely on an unresponsive answer to a question put on cross-examination by Petitioner's counsel. When asked as to the reason for the strike at Baldwin, Veleke testified that on the 20th the

mediator "attempted to get the parties together at Turtle Lake in the evening." There was an indication that *Turtle Lake* wanted to settle the agreement and that after the management people had met from 8:00 until midnight Anderson, the mediator, came out and reported that if the men went back to work, they would talk. (J.A. 185).

The foregoing evidence is not only double hearsay, but it was unresponsive. The General Counsel made no effort to develop this testimony further. If the testimony is to be accepted at all, the only inference that can be drawn from it is that the meeting and the statement had to do only with Turtle Lake, whose board of directors attended the meeting (J.A. 185). Petitioner was not represented at that meeting (J.A. 372), and while the General Counsel identified the group negotiators at the other meetings, no attempt was made to develop this testimony on redirect examination or on the examination of other witnesses present on that occasion. In any event, this fragmentary evidence, considered in the light of the record as a whole, does not prove that *Petitioner* absolutely refused to negotiate with the Union at Turtle Lake on June 20, unless the *Turtle Lake* employees returned to work.

Petitioner, rather than undermining the joint negotiations, supported them, notwithstanding Union requests for individual bargaining. The Board found that on June 10 the Union requested Petitioner to bargain individually (J.A. 22). That same request was renewed by the Union on June 21, and rejected by Petitioner (J.A. 23).

The Board further found that after an agreement had been reached on wages at the May 29 meeting (J.A. 21), the Union on June 19 repudiated its agreement and demanded an additional 5¢ per hour (J.A. 22). Moreover, the Union on June 19, shortly after it submitted a new proposal to the employer committee and while the mediator

was still trying to bring about an agreement between the parties, ordered that Turtle Lake be struck, without informing the mediator or the employer negotiators (J.A. 278, 279). Later on June 25, in the negotiations with Petitioner, the Union rejected the area agreement on wages negotiated just that morning, and made wage demands on Petitioner that would have provided an increase over and above those provided for in the area agreement (J.A. 66, 199, 200).

Finding *Petitioner* guilty of bad faith bargaining under these circumstances, is to disregard the facts and the law of the case.

d. The Board Finding That Petitioner Was Chargeable with the Alleged Refusal on June 20 Was Erroneous As a Matter of Law.

The unrebutted testimony shows that Petitioner was not represented at the June 20 meeting (J.A. 372). Notwithstanding this fact, the Board found that Petitioner was chargeable with the group negotiators' alleged refusal to bargain with the Union on June 20 (J.A. 54). While this finding is unexplained, presumably it is based on Union testimony that Torrison acted as "spokesman" for the group committee.

While Torrison may have acted as spokesman for the *group committee*, all of the Board's own findings are to the effect that Torrison had no authority to *bind* Petitioner, much less commit an unfair labor practice on its behalf.

The Board found:

(1) That the Union was notified that the employers negotiating committee had no authority to commit the members and that all agreements were subject to ratification (J.A. 16).

(2) That Petitioner was represented on the negotiating committee by its own representative, Cameron, (J.A. 17).

(3) That the negotiating committee was required to report back to the employers with respect to areas of disagreement (J.A. 18).

(4) That on May 16 the Union was specifically advised by Cameron that Torrison was not working for Petitioner and that Cameron was handling Petitioner's interests in negotiations (J.A. 19).

(5) That on June 21 the Union was advised by Petitioner that it was dissatisfied with Torrison but would abide by the *agreements* made by the group committee (J.A. 25).

(6) That on June 25 Torrison advised the Union committee that he had no authority to commit Rice Lake (J.A. 28).

(7) That on June 27 Torrison refused to sign a memorandum agreement on behalf of Petitioner. (J.A. 31).

(8) That the Union at the outset of negotiations was advised that the employers negotiating committee had *plenary* authority to bind the employers *only* to the original proposal, and beyond that had no authority *to commit* the employers.

(9) That the committee could only recommend and that any agreement would have to be ratified by the employers (J.A. 43).

(10) That Petitioner was reluctant to entrust labor relations to a man about whom they knew nothing, but wanted Cameron to handle negotiations, as before (J.A. 49).

(11) That Petitioner consistently honored its commitments with respect to joint negotiations (J.A. 49).

(12) That Petitioner's participation in joint negotiations was *limited* and it openly granted only limited negotiation authority to the group committee (J.A. 51).

Cameron, consistent with the foregoing Board findings, testified that he represented Rice Lake on the negotiating committee (J.A. 265), and that Torrison was never authorized to do anything for Rice Lake Creamery in connection with negotiations (J.A. 374). It would appear elementary that unless Torrison was Petitioner's authorized agent acting within the scope of his authority, his acts could not bind Petitioner.

The main force of the *General Counsel's* case was to attempt to prove that Petitioner was bound to accept the tentative area agreement reached on June 25, without any reservations. The findings above referred to rejected that contention. *There was no claim or attempt to prove that Torrison was authorized by Petitioner on Petitioner's behalf to refuse on June 20 to bargain further unless the Turtle Lake employees returned to work.* Absent any such evidence, and in the light of the Board's own findings that Petitioner openly granted only limited negotiating authority to the group committee, the Board's *legal conclusion* that the group committee's alleged refusal to bargain on June 20 was chargeable to Petitioner was invalid as a matter of law.

2. The Board's and the Court's Finding That There Was a Causal Connection Between the Strike on June 22 and the June 20 Turtle Lake Incident Is Contrary to All of the Facts in the Record.

There is not an iota of testimony showing that Petitioner's employees left their jobs on June 22 because of anything that occurred at midnight on June 20, at Turtle Lake.

On the contrary, the Board found that on June 21 the Union informed Petitioner that it was in bad with the Union because it was taking Turtle Lake milk and that it would strike Petitioner's plant if Petitioner would continue to take that milk, and that Petitioner refused to bow to the threat (J.A. 24); that the strike at Petitioner's plant was part of a prearranged Union plan to put pressure on the employers to reach an agreement (J.A. 54); that the strike at Petitioner's plant followed that prearranged plan (J.A. 56); that the strike was in part caused by Petitioner's refusal to bargain *individually* on June 21 and its declared intention to take Turtle Lake milk (J.A. 55, Note 27).

The strike at Rice Lake was the fourth strike called since June 19. A few hours after Petitioner's refusal to refrain from taking Turtle Lake milk, the strike order was issued by Veleke (J.A. 26).

Immediately following the meeting between Petitioner and the Union at Rice Lake on the afternoon of June 21 Veleke informed the Union steward that if there was to be a strike it was because Petitioner would not stop taking Turtle Lake milk (J.A. 306). The steward further testified that the men were upset about having to accept Turtle Lake milk and that he had informed Veleke that

the men were willing to go on strike if there was a possibility of him calling a strike (J.A. 307).

The Court below expressed some doubt as to the necessity of proving the causal connection between the unfair labor practice and the strike (App. p. 4a). Other circuit courts have uniformly held that the causal connection between the unfair labor practice and the strike must be established by proof. *NLRB* v. *Jackson Press, Inc.*, 201 F. (2d) 541, p. 546, 7th Cir.; *NLRB* v. *James Thompson & Co.*, 208 F. (2d) 743, p. 749, 2nd Cir.; *NLRB* v. *Scott & Scott*, 245 F. (2d) 926, p. 929-930, 9th Cir.; *Winter Garden Citrus Products Cooperative* v. *NLRB*, 238 F. (2d) 128, p. 129, 5th Cir.

The evidence referred to in the Court's opinion (App. p. 3a), as the quotations indicate, refer to the claimed refusal on June 19, which refusal the Trial Examiner and the Board found not to be substantiated. There is no indication that the lower Court intended to reverse this finding by the Board.

The Board's finding that the June 22 strike was caused by the incident on June 20 is based on a tenuous theory contrary to the facts. The drawing of inferences contrary to the uncontradicted evidence in the record will not be accepted by the courts. *Pittsburgh-Des Moines Steel Co.* v. *NLRB*, 284 F. (2d) 74, p. 87, 9th Cir.; *Farmers Cooperative Co.* v. *NLRB*, 208 F. (2d) 296, p. 299, 8th Cir.; *U. S. Steel Corp.* v. *NLRB*, 196 F. (2d) 459, p. 464, 7th Cir.; *Boeing Airplane Co.* v. *NLRB*, 140 F. (2d) 423, p. 433, 10th Cir.; *Quaker State Oil Refining Corp.* v. *NLRB*, 119 F. (2d) 631, p. 632, 3rd Cir.; *Martell Mills Corp.* v. *NLRB*, 114 F. (2d) 624, pp. 627, 628, 4th Cir.; *Ballston-Stillwater Knitting Co., Inc.* v. *NLRB*, 98 F. (2d) 758, p. 760, 2nd Cir. See also, *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474.

The finding that the strike was caused by the alleged June 20 incident is, therefore, invalid.

3. The Board Finding That in December of 1958 the Strikers Made an Unconditional Offer to Return to Work Was Erroneous as a Matter of Law.

The Board found that on and after December 22, 1958 Petitioner discriminatorily rejected the *unconditional* request of the strikers for reinstatement (J.A. 76), and as a result of this finding ordered Petitioner to reinstate *all* of the strikers, dismissing the replacements if necessary, and to compensate the strikers for any loss of pay they may have suffered from December 22, 1958.

As of December 2 Petitioner had a full complement of employees for the jobs that remained available (J.A. 531).

The *uncontradicted* evidence shows that on December 2 the strikers, in connection with an application for unemployment compensation, "were told to go down to the Creamery office and apply for our jobs back," and that the purpose of this application "was to qualify for unemployment compensation" (J.A. 315). The Board found that on December 2 the Union steward told the office manager that the strikers were available *then* to go back to work as a *group* (J.A. 40), and were advised to see one of the Gerlands, officers of Petitioner (J.A. 40). Instead of doing so *and abandoning the strike*, the strikers upon leaving the office *resumed picketing* (J.A. 304). Picketing was in effect at all times from June 22, 1958 to the time of the hearing (J.A. 167). None of the strikers made any attempt to see either Harry or Ervin Gerland, Petitioner's officials, after being so advised by the office manager and by Petitioner's letter of December 3 (J.A. 513, 514), *because no one wanted to cross the picket line to go to work* (J.A. 318).

All of this testimony is from Union witnesses and is uncontradicted. This evidence conclusively shows that the so-called application for work, rather than being unconditional, was merely a tactical maneuver engaged in to qualify for unemployment compensation, without any intent to abandon the strike and return to work under the conditions offered by Petitioner. See, *Oklahoma Furniture Mfg. Co.*, (1953), 104 NLRB 771; *Scott Paper Box Co.*, (1949), 81 NLRB 535.

The cases cited under the previous heading, with reference to the drawing of inferences contrary to the uncontradicted evidence in a record, have equal application here.

4. The Decision of the Court Below Is in Conflict with Prior Decisions of this Court and with the Decisions of Other Circuits, and Calls for the Exercise of this Court's Supervisory Authority.

The decision of the Court below is in conflict with the decisions of this Court and the decisions of the First, Third, Fifth, and Seventh Circuits, cited above, to the effect that where the Board improperly bases its findings on a charge not contained in the complaint, and the record discloses that the basis of this finding has not been litigated at the hearing, such finding is not entitled to enforcement. The affirmance by the Court below of the Board's June 20 finding, and the order based thereon are in conflict with these decisions.

The decision of the Court below, which in effect sustained inferences drawn by the Board which were in conflict with uncontradicted testimony in the record as to the cause of the June 22 strike, and the December applications, conflicts with the decisions of the Second, Fourth, Seventh, Eighth, Ninth, and Tenth Circuits, cited above.

The issues raised in this petition involve a thrust at the heart of American jurisprudence. Not only the administration of the National Labor Relations Act, but the obligation of all quasi-judicial agencies and the Courts themselves to accord persons charged by their Government a fair and impartial hearing is the fundamental issue raised by this petition. This Court, in the exercise of its responsibility to supervise judicial proceedings in the United States and to preserve the Constitutional rights of individual citizens, should grant this petition and review the proceedings below.

CONCLUSION

It is, therefore, respectfully submitted that the denial by the Board of procedural due process of law and the sanction thereof by the lower Court; the conflicts between the decision in the lower Court and the decisions of other Courts of Appeal; and the importance of the questions herein presented to the overall administration of justice in the United States warrant a review by this honorable Court of the decisions of the National Labor Relations Board and the Court below.

Dated July 30, 1962

Respectfully submitted,

CLARK M. ROBERTSON,
Attorney for Rice Lake Creamery.

O. S. HOEBRECKX,
Of Counsel.

APPENDIX I.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 16470

GENERAL DRIVERS AND HELPERS UNION, LOCAL 662 AFFILIATED WITH THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT
RICE LAKE CREAMERY COMPANY, INTERVENOR

No. 16505

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

RICE LAKE CREAMERY COMPANY, RESPONDENT

On Petition to Review and on Petition to Enforce an Order of the National Labor Relations Board

Decided May 3, 1962

Mr. David Leo Uelmen for petitioner in No. 16470.

Decision of Court.

Mrs. Nancy M. Sherman, Attorney, National Labor Relations Board, with whom *Messrs. Stuart Rothman*, General Counsel, National Labor Relations Board, *Dominick L. Manoli*, Associate General Counsel, National Labor Relations Board, *Marcel Mallet-Prevost*, Assistant General Counsel, National Labor Relations Board, and *Samuel M. Singer*, Attorney, National Labor Relations Board, were on the brief, for petitioner in No. 16505 and respondent in No. 16470.

Mr. O. S. Hoebreckx for intervenor in No. 16470 and respondent in No. 16505.

Before EDGERTON, BAZELON and FAHY, *Circuit Judges*.

EDGERTON, *Circuit Judge*: On June 28, 1961 the Board ordered the Rice Lake Creamery Company to cease an desist from certain practices, bargain collectively with the Union, offer reinstatement to certain employees, and compensate them for loss of pay. 131 NLRB No. 161. The Board seeks enforcement of its order. The Union seeks review of the Board's failure to find that a collective bargaining agreement which was made between the Union and a group of dairies bound the Company.

In 1952 the Board had certified the Union as exclusive bargaining representative of a unit consisting of the Company's production and maintenance employees. The Company and the Union afterwards entered into a series of collective bargaining agreements, the last of which expired May 31, 1958. In March 1958 the Union notified the Company that it wished to negotiate a new agreement and served similar notices on other dairies in the area. The Company and these other dairies are referred to as "the Group".

On April 14, 1958 the Union asked all members of the Group to engage in joint negotiations. The Board found that the Company authorized a Group Committee to negotiate for it except in respect to certain specified matters, but that both sides bargained throughout on the premise that their negotiators had limited authority; that any agreement must be submitted to the principals, including the Company, for ratification; and that thereafter the Union would still have to negotiate some matters individually with some employers, including the Company.

Between May 8 and June 19, 1958 the Group Committee and the Union held a number of negotiating sessions but did not reach an agreement. On June 19 the Group Committee refused to negotiate further and the Union called a strike against the Turtle Lake dairy, one member of the Group. On June 20 and 21 it called strikes against two of the other members. On the evening of June 20, after a meeting at Turtle Lake, the Group Committee told the Union through a mediator that it would talk further with the Union if the strikers returned to work.[1] They refused. On June 22 the Union began its strike against the respondent Company.

The Board correctly found that the "refusal of Respondent through its negotiators to meet with the Union unless

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[1] The Union's representative Veleke testified that mediator Anderson told him the Group negotiator "had notified Mr. Anderson to tell us that if the men went back to work they would talk"; and again, "They said they talked if the men went back to work." The Company now objects to this testimony as hearsay, but the Board has more latitude than a court in admitting testimony and the Company did not object to this testimony when it was given.

The Company included in its exceptions to the Trial Examiner's report which the Board adopted the "finding . . . relative to the alleged negotiations meeting at Turtle Lake on June 20."

and until it ended the [Turtle Lake] strike was a clear refusal to bargain in violation of Section 8(a)(5) of the Act." The Act makes an unlawful refusal to bargain "an unfair labor practice". The Board also found that "Since the Group negotiators did not resume face-to-face bargaining with the Union until June 24th, it is clear that the . . . unlawful refusal to meet continued at least until that date and was a direct cause of the strikes at the other three plants. Hence . . . the strike at Respondent's plant on June 22nd was an unfair labor practice strike from the outset.".

The National Labor Relations Act as amended provides that if the Board finds that a "person named in the complaint has engaged in or is engaging in any . . . unfair labor practice", the Board shall require "such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act." 29 U.S.C. §160(c). Whether a causal connection between the unfair labor practice and the strike is or is not necessary, we think the record supports the Board's finding that there was a causal connection.

The time sequence itself supports the finding. The Union had negotiated with the Group for several weeks without calling strikes. When the Group refused to negotiate, strikes were promptly called. It is reasonable to infer from this that there was a causal connection, and not a mere accidental coincidence, between the refusals and the strikes. Testimony of Union officers points in the same direction. Mr. Veleke, secretary-treasurer of the Union, testified: "we called a strike at Turtle Lake because we could not negotiate a new contract at that time with the committee, we couldn't reach an agreement. Q. . . . Now,

isn't it a fact that at the time the strike started at Turtle Lake that you and the union management committees were in meeting at Menomonie that same day? A. Well, you can say we were in Menomonie; as far as in meeting, we asked the conciliator several times to bring them and they refused to come in to talk." Mr. Burger, a business agent of the union, was asked: "So the conduct of the negotiations on the morning of June 19 had nothing to do with the strike on June 19 as far as the employees were concerned?" He replied: "Yes, it did." Mr. Novacek, the president of the union, testified: ". . . during the afternoon of the 19th when the company or the negotiating committee for the employees [employers] refused to come in the room we sat there, the four or five of us, and discussed the situation and we decided to strike Turtle Lake . . . ."

On Saturday, June 21, Mr. Weleke went to Rice Lake. At the Board hearing counsel for the Company said to him: "But your previous custom was to make prior arrangements for negotiations?" He replied: "Yes. When there was not any labor dispute and when negotiations were progressing on a normal basis where people were talking, yes. But when people weren't talking, why, you are kind of confused as to what to do, because you won't get no agreement when people won't talk to you." The Company's unlawful refusal on June 20, through the Group, to resume bargaining while strikes were going on, had not been withdrawn when the strike against the respondent Company began on June 22.

No doubt the Company's refusal to bargain was not the only cause of the strike. There was evidence that its refusal to stop handling Turtle Lake milk was one cause. But if an unfair labor practice had anything to do with causing the strike, it was an unfair labor practice strike. *National Labor Relations Board* v. *Stackpole Carbon Co.*,

3d Cir., 105 F. 2d 167, 176, *cert. denied*, 308 U.S. 605. *National Labor Relations Board* v. *Birmingham Publishing Co.*, 5th Cir., 262 F. 2d 2.

Moreover the Board found that after the strike began, the Company failed to bargain in good faith and committed other unfair labor practices which prevented agreement and prolonged the strike. "It should be noted that even where a strike which initially involved no unfair labor practice is prolonged or aggravated by an employer's unfair labor practice, the same rule applies as where the strike is the *result* of an unfair labor practice, and the employer is bound to reinstate all strikers and discharge all those hired to replace them during the strike." *National Labor Relations Board* v. *Remington Rand, Inc.*, 2d Cir., 130 F. 2d 919, 929, fn. 8. "There is no question but that where a strike is initially undertaken for economic reasons but is prolonged by reason of the employer's intervening unfair labor practices, the employer is in the same position he would have been in had his unfair labor practice caused the strike in the first place . . . ." *National Labor Relations Board* v. *Crosby Chemicals, Inc.* 5th Cir., 188 F. 2d 91, 95.[3]

The Company contends it "was denied due process of law by the Board's action in finding unfair labor practices based on matters which were not presented for trial or litigated at the hearing, and by predicating its order thereon." We find no denial of due process. The chief though not the only contention of the Company under this head is that the Board should not have considered the June 20 incident at Turtle Lake because it was not referred to in the Board's Complaint and Notice of Hearing and because, at the outset of the hearing, 'there was no reference *by anyone* to *any* claim of an unfair labor practice on June 20 at Turtle Lake which caused the strike at

Respondent's plant on June 22." But the Complaint and Notice of Hearing charged that the Company "has been engaging in and is engaging in unfair labor practices . . . . Beginning on or about May 8, 1958, and at all times thereafter, the Respondent has failed and refused, and continues to fail and refuse, to bargain collectively with the Union as the exclusive collective bargaining representative of all the employees of the Unit, in that *inter alia* it: a. Entered into negotiations with the Union on or about May 8, 1958, with a fixed intention and determination not to arrive at a collective bargaining agreement, and throughout the course of subsequent negotiations engaged in conduct calculated to accomplish that result." The incident at Turtle Lake on June 20 was conduct calculated to accomplish that result and was therefore within the scope of the complaint. The Board was not obliged to plead its evidence.[4]

We think it unnecessary to discuss the Company's other contentions and the Union's contentions. We find that the Board's order rests on findings supported by substantial evidence and is in accordance with law. The order will be enforced.

Order enforced.

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[3] Cf. *Warehousemen and Mail Order Employees, Local No. 743, Internat'l Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America* v. *National Labor Relations Board*, —— U.S. App.D.C. ——, —— F.2d ——, decided Jan. 23, 1962.

[4] The Company's brief in this court concedes that "the General Counsel in the three briefs filed with the Trial Examiner made a *passing* reference to the June 20 incident at Turtle Lake."

APPENDIX II.

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 16,470 September Term, 1961

GENERAL DRIVERS AND HELPERS UNION, LOCAL 662 AFFILIATED WITH THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT
RICE LAKE CREAMERY COMPANY, INTERVENOR

No. 16,505

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

RICE LAKE CREAMERY COMPANY, RESPONDENT

On Petition to Review and on Petition to Enforce an Order of the National Labor Relations Board

Before EDGERTON, BAZELON and FAHY, *Circuit Judges.*

Filed May 3 1962
Joseph W. Stewart
Clerk

Judgment.

These cases came on to be heard on the record from the National Labor Relations Board and on a petition to review, and a petition for enforcement of, the order of the National Labor Relations Board herein, and were argued by counsel.

On consideration whereof, it is ORDERED and ADJUDGED by this court that the order of the Board will be enforced.

Pursuant to Rule 38(b) the National Labor Relations Board shall within 30 days hereof serve and file a proposed enforcement decree consistent with the opinion and judgment of this court.

Per Circuit Judge Edgerton.

Dated: May 3, 1962.

APPENDIX III.

Statutes.

National Labor Relations Act, as amended, (61 Stat. 135, 29 U.S.C. 151, *et seq.*):

Section 7.

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

Section 8.

(a) It shall be an unfair labor practice for an employer—

(1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

(3) By discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization. * * *

(5) To refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a).

(d) For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession.

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INDEX

	Page
Opinions below	1
Jurisdiction	1
Questions presented	2
Statute involved	2
Statement	2
A. The Board's findings of fact	2
1. Background	2
2. The Group's refusal to meet with the Union unless the strikers return; the Union's strike against petitioner	4
3. The agreement between the Group and the Union, and the Union's attempts to obtain a contract with petitioner based thereon	5
4. Petitioner's repudiation of the entire Group agreement; the fruitlessness of further negotiations	7
5. Petitioner's withdrawal of recognition from the Union; its unresponsiveness to the strikers' applications for reinstatement	10
B. The Board's decision and order	12
C. The decision of the court of appeals	14
Argument	14
Conclusion	21

CITATIONS

Cases:	
Diaz v. *United States*, 223 U.S. 442	19
National Labor Relations Board v. *Cement Masons Local No. 555*, 225 F. 2d 168	18
National Labor Relations Board v. *Pecheur Lozenge Co.*, 209 F. 2d 393, certiorari denied, 347 U.S. 953	18
United Mine Workers v. *Patton*, 211 F. 2d 742	18
Universal Camera Corp. v. *National Labor Relations Board*, 340 U.S. 474	17

655488—62——1

Statute:
National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C. 151, *et seq.*): Page
Section 8(a)(1), (3), and (5) 12, 13
Miscellaneous:
1 Wigmore, *Evidence*, § 18, pp. 321–325 (3d ed. 1940) 19

In the Supreme Court of the United States

OCTOBER TERM, 1962

No. 290

RICE LAKE CREAMERY COMPANY, PETITIONER

v.

GENERAL DRIVERS & HELPERS UNION, LOCAL NO. 662, AFFILIATED WITH THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN & HELPERS OF AMERICA, AND NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a–7a) is reported at 302 F. 2d 908. The Decision and Order of the National Labor Relations Board (J.A. 4–85) [1] are reported at 131 NLRB 1270.

JURISDICTION

The judgment of the court of appeals was entered on May 3, 1962 (Pet. App. 8a–9a). The petition for

[1] "J.A." references are to the joint appendix in the Court below. References preceding a semicolon are to the Board's findings; succeeding references are to the supporting evidence.

a writ of certiorari was filed on July 31, 1962. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the Board deprived petitioner of due process of law by finding unfair labor practices which allegedly were not set forth in the complaint or litigated at the hearing.

2. Whether substantial evidence on the record considered as a whole supports the Board's finding, affirmed by the court below, that (a) a strike at petitioner's plant was caused and prolonged by petitioner's unfair labor practices; and (b) petitioner declined to reinstate the strikers after they made a bona fide request to return to their former jobs.

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C. Sec. 151, *et seq.*), are set forth in the petition (Appendix III, 10a–11a).

STATEMENT

A. THE BOARD'S FINDINGS OF FACT

1. BACKGROUND

In May 1952, the Board certified the Union [2] as the exclusive bargaining representative of a unit consisting of petitioner's production and maintenance em-

[2] General Drivers and Helpers Union, Local 662, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America.

ployees and driver-salesmen (J.A. 13; 100–102). Thereafter, petitioner and the Union entered into a series of collective bargaining agreements, the last of which expired on May 31, 1958 (J.A. 13; 111).

About March 24, 1958,[4] the Union served notice on petitioner of its desire to negotiate a new collective bargaining agreement to supplant the current contract (J.A. 14; 112, 500). At the same time, the Union served similar notices on 15 other dairies within the area of its jurisdiction (J.A. 15; 112–113). These dairies and petitioner are referred to collectively as "the Group." On April 14, the Union sent identical letters and identical contract proposals to each employer in the Group, asking it to enter into "joint negotiations" directed toward the execution of a new contract (J.A. 15; 104–105, 108, 114, 423–445, 501).

When petitioner received the request and the proposal, its president, Ervin Gerland, turned them over to William A. Cameron, its attorney, advising him that petitioner would participate in the joint negotiations (J.A. 15; 373–374, 502). By letters dated April 23 and May 7, Group Attorney Mandt Torrison advised the Union that all employers in the Group, including petitioner, had agreed to appoint a committee of four representatives, including Torrison, to engage in joint negotiations with the Union (J.A. 15, 17; 115–116, 503–505). Enclosed with the May 7 letter were copies of the Group's contract proposals (J.A. 17; 108, 116, 445–458).

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[3] Petitioner, a Wisconsin corporation, operates a plant which processes milk into butter, ice cream, and other dairy products (J.A. 12).

[4] All events herein occurred in 1958 unless otherwise stated.

Between May 8 and June 19, the Union and the Group Committee held a number of negotiating sessions, but failed to reach an agreement (J.A. 17–23; 117–125, 221–224, 239–247, 258–261, 272–274, 282–286, 341–344). On June 19, after the Group Committee advised the Union that it had nothing further to discuss, the Union called a strike at the plant operated by one member of the Group, Turtle Lake Cooperative Creamery, and on the following day it struck another member of the Group, Farmer's Cooperative Dairy, at Clear Lake (J.A. 23; 183–185). These strikes were part of a Union plan to strike all plants of the Group, one by one, in order to build up pressure to reach an agreement (J.A. 54; 183–186).

2. THE GROUP'S REFUSAL TO MEET WITH THE UNION UNLESS THE STRIKERS RETURN; THE UNION'S STRIKE AGAINST PETITIONER

At about midnight on the evening of Friday, June 20, the Group Committee advised Union Representative Veleke that it would talk further with the Union if the strikers would return to work (J.A. 23; 185, 188). Veleke replied that the Union was happy to talk further, but the strikers refused to go back to work (J.A. 23; 185). Accordingly, the Group Committee did not meet with the Union at that time.

On the following day, June 21, the Union called a strike at a member dairy in Baldwin, Wisconsin (J.A. 23; 125, 186). On the same day, Veleke and Union Representative Mueller drove to petitioner's plant in Rice Lake, Wisconsin (J.A. 23; 126, 224). They asked Company Attorney Cameron to "settle this thing * * * right now by negotiating a contract", in-

dividually (J.A. 23, 25; 226, 127, 293). Cameron replied that the Company was being represented by Torrison in the joint negotiations and was committed to abide by any agreement made by Torrison and the Group Committee (J.A. 25; 127, 224–225, 226, 292–293, 308). Company President Ervin Gerland, who was present, confirmed this statement (J.A. 25; 293). Cameron added that "this would probably be settled" in a few days, and that "we can sweat it out for a couple of days" (J.A. 25; 129, 190, 249). While this conversation was taking place, petitioner posted a notice on the plant bulletin board (J.A. 24–25; 102, 128, 225, 403) which stated that petitioner intended "to operate the plant regardless of any action the Union may take," "urged" the employees to continue working, and warned that "In the event the Union strikes the plant any employee not reporting for work will be considered on strike and will be replaced."

On Veleke's instructions, petitioner's employees went on strike at the beginning of the day shift on the following morning, Sunday, June 22 (J.A. 26; 262).

3. THE AGREEMENT BETWEEN THE GROUP AND THE UNION, AND THE UNION'S ATTEMPTS TO OBTAIN A CONTRACT WITH PETITIONER BASED THEREON

Because of the pressure exerted by the strikes described above, several members of the Group decided to resume negotiations with the Union, and, at an all-night bargaining session beginning on June 24, the Union and the Group Committee reached an agreement (J.A. 26–28; 131–137, 190–194, 241, 347–353). The State mediator advised Company Attorney Cameron of the terms of the settlement, and arranged a

meeting between the Union and petitioner on the afternoon of June 25 to consummate a contract with petitioner (J.A. 28; 139, 192–193).[5]

At the June 25 meeting, the Union asked petitioner whether the agreement just reached with the Group Committee was also an agreement with petitioner (J.A. 29; 140). Petitioner replied that it would accept that agreement if the Union would agree to substitute certain provisions from the recently expired contract between petitioner and the Union, including those providing for a modified rather than a full union shop,[6] separate seniority for driver-salesmen, and job classifications[7] (J.A. 29; 140–142, 203–204). The Union membership rejected this proposal, primarily because they wanted a full union shop in order to elim-

[5] Cameron and petitioner's President Gerland had been present at the outset of the June 24 Group Committee negotiations, but left when the bargaining actually got under way (J.A. 28). The Group Committee, although authorized to discuss and negotiate an area contract, had no authority finally to commit petitioner and other members of the Group without their subsequent ratification (J.A. 16–17; 335–337, 527–530).

[6] The modified union shop did not require union membership of presently employed employees who had never joined the Union (J.A. 405–406, 108).

[7] Some of petitioner's employees were in a lower job classification, and accordingly received lower wages, than if they had performed the same job for the other members of the Group. Petitioner's assertion that, during the June 25 negotiations, "the Union rejected the area agreement on wages negotiated just that morning and made wage demands on Petitioner that would have provided an increase over and above those provided for in the area agreement" (Pet. 21), merely relates to the Union's efforts to conform petitioner's job classification system to that of other members of the Group (J.A. 65–66; 141–142, 197–207, 343).

inate favoritism which, they thought, petitioner was evincing in favor of nonmembers (J.A. 29–30; 142–145, 204, 250, 254, 265–266, 294–295).

On July 8, petitioner submitted a contract proposal including, *inter alia*, a "modified union shop" clause which omitted a provision in the expired contract that petitioner would recommend union membership to nonmembers (J.A. 32; 146–153, 208–211, 507). The membership rejected this proposal because they felt that it provided inadequate protection against preference to nonmembers (J.A. 33; 153–154, 213–214). However, on July 9 Union Representative Veleke told petitioner that he might be able to "sell" that proposal, and "wind the thing up," if petitioner would recommend to three of the six nonunion employees that they join the Union (J.A. 33; 157, 216). Later that day, petitioner, without explanation, advised the Union that it had withdrawn "the offer to execute the contract we have discussed yesterday" (J.A. 33, 63; 157–158).

4. PETITIONER'S REPUDIATION OF THE ENTIRE GROUP AGREEMENT; THE FRUITLESSNESS OF FURTHER NEGOTIATIONS

Finally, on July 25, petitioner informed the Union that it would not go along with the Group agreement (J.A. 34–35; 158–159). The Union and Company Attorney Cameron then worked out a tentative agreement which was essentially the same as the one which petitioner had proposed on June 25 and the employees had rejected (J.A. 35–36; 162–166, 231–232, 333–334, 370–371, 509–513). However, instead of the "modified union shop" provisions in petition-

er's earlier proposal and in the expired contract, the tentative agreement contained a union-security clause which required union membership only of employees who executed checkoff cards, and a clause which, although prohibiting employer discrimination based on union membership or nonmembership, did not contain a provision previously sought by the Union for back pay to employees so discriminated against (J.A. 32, 35–36; 148–150, 163, 165–166, 208–209, 212, 333–334, 370–371, 507, 509–512).

The Union membership accepted this tentative agreement (J.A. 36; 165, 232–233). Company Attorney Cameron told petitioner's top management that the agreement was "better than anything [he] had hoped to get," and recommended that they accept it (J.A. 37; 361). However, on July 26, the Gerlands turned it down without explanation (J.A. 37; 361–362). Moreover, later that day, they advised the Union that they considered some of the striking employees, including Union Steward DeBoer, as "undesirable," and one of them observed that he "didn't see any reason they should take any of the workers back because the crew that they had now hired was perfectly satisfactory" (J.A. 37–38; 235).

The last meeting of the parties was held on August 28 (J.A. 38; 252, 274). The Union asked whether petitioner's last offer of July 25 was still in effect (J.A. 38; 274). Company Attorney Cameron replied that there was no pending proposal from petitioner, as it had withdrawn any proposal made at that meeting, and that if the parties were to arrive at any agreement it would "have to be worked out from

scratch" (J.A. 38; 253). The Union asked what variations from the July 25 proposal petitioner wanted (*ibid.*). Cameron conceded that the "economics of the contract" presented no problem, but stated that any agreement reached would have to exclude union security, checkoff, and any seniority, "maintenance of standards," and "protection-of-rights" and "successorship" clauses,* and must include a management prerogative clause giving petitioner the sole right to interpret and "execute" the contract (J.A. 38; 253–254, 266–267, 274, 276–277). Cameron conceded that he felt the Union would not be interested in this proposal (J.A. 38; 254, 267–268, 277). The Union took the position that all strikers must be taken back without loss of seniority, even though petitioner might thereby be compelled to release the employees who had been hired to fill the strikers' jobs (J.A. 38–39; 266–268, 364). Cameron said that the striking employees were "all impudent" and were not entitled to come back, for personal reasons and because they did not "appreciate" the Gerlands; that petitioner might take back four to six strikers without seniority to fill any jobs available, but that these strikers would have to reapply at the plant for employment; and that the Company was not interested in the rest of the strikers, who had worked for petitioner for as long as 19 years (J.A. 39; 130–131, 254, 267–268, 506). Cameron also told Steward Harry DeBoer, who had been petitioner's maintenance man for 13 years but had acted as employee spokesman in

* The previous contract had covered all of these subjects (J.A. 405–422).

seeking to induce Cameron to accede to a union shop, that his job had been abolished at the beginning of the strike (J.A. 39; 254–255, 275, 290–291, 294–297).

"Working from scratch," as Cameron demanded, the Union produced the original proposal which it had submitted to the Group five months earlier (J.A. 39; 255, 274). The parties went over it, clause by clause, with little or no discussion of each clause. As each clause was read, Cameron would merely say whether petitioner accepted it or rejected it (J.A. 39; 255–256, 268, 276, 363). Petitioner accepted seven of the 19 clauses covered—all of which were noncontroversial and substantially like those in the expired contract—and rejected the others (J.A. 39; 256–257).

5. PETITIONER'S WITHDRAWAL OF RECOGNITION FROM THE UNION; ITS UNRESPONSIVENESS TO THE STRIKERS' APPLICATIONS FOR REINSTATEMENT

About two weeks later, on September 10, petitioner cancelled a bargaining meeting set for the following day, and sent the Union a letter declining to bargain with it, on the ground that it no longer represented a majority of the employees (J.A. 40; 166–167, 512–513).

On December 2, most of the striking employees went to the plant in a body. A committee, headed by Union Steward DeBoer, went in to see Secretary-Treasurer Loretta Gerland and stated that the strikers were at the plant to apply for their jobs and to go back to work as a group; that all of them were available for work at once (J.A. 40; 298–299). Miss Gerland replied that she had nothing to do with hiring male employees; that they would have to see President

Ervin Gerland, who was in the hospital, or Vice President Harry Gerland, who was out of town; and that the strikers would hear from petitioner later (J.A. 40; 299, 318). She noted the names of the committee and, looking outside the door, acknowledged the presence of the other strikers (J.A. 40–41; 299–300).

By letter postmarked December 8, Company Attorney Cameron advised Union Steward DeBoer that Cameron and President Ervin Gerland were "handling the matter for the creamery" and that neither was available at that time (J.A. 41; 300, 513–514). Cameron stated, "If any of the former employees wish to make application" they should apply to Harry or Ervin Gerland, and "their application will be given consideration when and if jobs for which they are qualified are available" (J.A. 41; 300, 514). Cameron also inquired (1) whether the application meant that the strike had terminated and the picket lines would be removed; and (2) whether "this [was] an offer by each of the individual former employees to return to work, or * * * would [they] return to work only if all of them were re-employed" (*ibid.*).

By letter of December 19, DeBoer referred Cameron to the Union for information as to the status of the strike and the picket line (J.A. 41–42; 301, 515). DeBoer added, however, that "the employees are willing to return to work" pending disposition of the unfair labor practice charges (J.A. 42; 301, 515). DeBoer further stated (J.A. 42; 304, 515–516):

> We made our position clear at the time of the application, and we restate at this time that all of the employees, individually and collectively,

> who are currently on strike, have applied to return to work. This application was made unconditionally and its unconditional offer still stands. In other words, Mr. Cameron, there are no "only if's" involved in this request.
>
> We wish to reassert at this time that we consider our original unconditional application made on December 2, 1958, to be an effective offer to return to work. However, if you wish to add any additional or further requirements or insist that the employees reapply, please consider this letter such re-application, without waiver of our position that our original application was legally effective. This letter is being written on my behalf and on behalf of all the other striking employees. [Emphasis in original.]

Petitioner never answered this letter or recalled any of the strikers (J.A. 42; 301, 317–318, 383–384, 531).

B. THE BOARD'S DECISION AND ORDER

The Board found, in agreement with the Trial Examiner, that petitioner violated Section 8(a) (5) and (1) of the Act by failing to bargain with the Union in good faith on and after June 20, (J.A. 53–55, 62–69). The Board relied, *inter alia*, on (1) petitioner's refusal (through the Group Committee) to meet with the Union until it ended the Turtle Lake strike (J.A. 53); (2) petitioner's withdrawal of its July 8 offer despite the Union's indication that the offer might be acceptable if petitioner would only agree, as it had in the expired contract, to recommend to three nonmembers in the unit that they join the Union (J.A. 62–66); (3) petitioner's unqualified rejection of the

July 25 tentative agreement, even though the Union's acceptance thereof meant that it had accepted, as a settlement of the last major point of disagreement between the parties (*i.e.*, the union security issue), even less than it had received under the expired contract (J.A. 67–68); and (4) petitioner's insistence, in the last bargaining meeting, on starting "from scratch" and omitting certain basic provisions in the prior contract (J.A. 68–69).

The Board found that this unlawful Company conduct, which "continually prevented the Union from securing a signed agreement," caused and prolonged the strike among petitioner's employees, which commenced on June 22 (J.A. 54–55, 69–70). The Board accordingly concluded that the strikers were unfair labor practice strikers and, as such, retained their status in the unit, and their right to reinstatement, even though their jobs may have been filled (J.A. 70). It found, therefore, that petitioner further violated Section 8(a) (5) and (1) by withdrawing recognition from the Union on the ground that the strike replacements had caused the Union to lose its majority status (J.A. 70), and violated Section 8(a) (3) and (1) by refusing to reinstate the strikers upon their application (J.A. 75–76). In addition, the Board found that petitioner violated Section 8(a)(1) of the Act by stating, at the August meeting, that it would consider taking back only a few of the strikers, and those only as new employees (J.A. 69, 55–56); and violated Section 8(a) (3) and (1) by terminating the job of Union Steward DeBoer because of his Union and concerted activities (J.A. 71–74).

The Board's order (J.A. 5–11), *inter alia*, requires petitioner to cease and desist from the unfair labor practices found, to offer reinstatement to the strikers unlawfully discriminated against and compensate them for loss of pay, to bargain with the Union upon request, and to post appropriate notices.

C. THE DECISION OF THE COURT OF APPEALS

The court of appeals enforced the Board's order (Pet. App. 2a–7a). The court sustained the Board's findings that petitioner's refusal, through the Group Committee, to meet with the Union unless and until it ended the Turtle Lake strike was an unlawful refusal to bargain and one of the causes of the ensuing strike of petitioner's employees (Pet. App. 3a–5a). Accordingly, the court agreed that the strike was an unfair labor practice strike from its inception (Pet. 5a–6a). The court also affirmed the Board's finding that, after the strike began, petitioner further refused to bargain and committed other unfair labor practices which prolonged the strike (Pet. App. 6a). Finally, the court rejected petitioner's contention that it was "surprised" and therefore denied due process of law by the Board's action in finding that the June 20 refusal at Turtle Lake was an unfair labor practice (Pet. App. 6a–7a).

ARGUMENT

1. There is no merit to petitioner's contention (Pet. 15–18) that the refusal of the Group Committee (which represented petitioner at that time) on June 20 to resume negotiations with the Union, except on

condition that the striking Turtle Lake employees return to work, was a matter neither comprehended by the complaint nor litigated at the hearing. The complaint issued by the Board (J.A. 393) alleged that:

> "Beginning on or about May 8, 1958, and at all times thereafter, the Respondent has failed and refused, and continues to fail and refuse, to bargain collectively with the Union as the exclusive collective bargaining representative of all the employees of the Unit, in that *inter alia* it: a. Entered into negotiations with the Union on or about May 8, 1958, with a fixed intention and determination not to arrive at a collective bargaining agreement, and throughout the course of subsequent negotiations engaged in conduct calculated to accomplish that result."

As the court below correctly concluded (Pet. App. 7a), "The incident at Turtle Lake on June 20 was conduct calculated to accomplish that result and was therefore within the scope of the complaint. The Board was not obliged to plead its evidence."[9]

[9] Petitioner suggests (Pet. 12–13) that the Board dismissed this portion of the complaint (Paragraph 10(a)) insofar "as it related to multiemployer bargaining." We submit that a careful reading of the Trial Examiner's Intermediate Report, which the Board adopted, shows that Paragraph 10(a) was dismissed only with respect to the allegations that petitioner failed to make clear to the Union the exact scope of the Group Committee's authority to bargain on its behalf and that the Group Committee engaged in bad faith bargaining on or before June 19; the paragraph was sustained, however, with respect to the Group Committee's refusal to meet between June 20 and June 24 (J.A. 51–55).

Moreover, contrary to petitioner's contention (Pet. 11–12; 18), a statement at the hearing itself confirmed that the negotiations at Turtle Lake would be a significant element in the Board's case. At the conclusion of his case-in-chief, counsel for the General Counsel asserted that among the causes of the strike at petitioner's plant was the refusal to bargain at Turtle Lake (J.A. 319–321). Although he gave the date as June 19 (when negotiations first broke off), rather than June 20 (when the Group Committee conditioned a resumption of negotiations on return of the strikers), this was sufficient to apprise petitioner that the entire period of the Turtle Lake break-down in negotiations, which lasted from June 19 to June 24 (see J.A. 22–23, 26–27, 53–55; 183–186), was in issue. In these circumstances, petitioner has no valid basis for its contention that it was "surprised" by the Board's finding that the Group Committee's conduct on June 20 was a refusal to bargain and was one of the causes of the subsequent strike at petitioner's plant.[10]

[10] Although a finding that there was a refusal to bargain on June 20 is an essential predicate for the Board's finding that the strike at petitioner's plant on June 22 was caused by unfair labor practices, it does not follow, as petitioner contends (Pet. 15–16), that the Board's order could not be sustained absent the June 20 finding. A strike which is economic at its inception may be prolonged and thus converted into an unfair labor practice strike by subsequent unfair labor practices. The Board found that, on and after July 9, petitioner engaged in further unfair labor practices (apparently not challenged here) which had the effect of prolonging the strike (p. 13, *supra*), and this finding was sustained by the court below (p. 14, *supra*). Petitioner's assumption that the Union

2. Petitioner's further contention (Pet. 18–26) that the record does not support the Board's findings, approved by the court of appeals, that petitioner was answerable for the refusal to bargain on June 20, and that such refusal was a cause of the strike at its plant, presents only an evidentiary issue which does not warrant review by this Court. See *Universal Camera Corp.* v. *National Labor Relations Board*, 340 U.S. 474, 490–491. In any event, the Board's findings are fully supported by the evidence.

(a) That the Group Commitee represented petitioner in the negotiations, at least up through June 20, is shown, *inter alia*, by these facts: When petitioner received the Union's request for joint negotiations, it told its attorney (Cameron) that it would participate in such negotiations, and this decision was in turn communicated to Group Attorney Torrison and the Union (p. 3, *supra*). When the Union sought to bargain individually with petitioner on June 21, the day after the Group Committee's unlawful refusal to bargain at Turtle Lake, petitioner replied that it was being represented by Torrison in the joint negotiations, and was committed to abide by the agreement concluded by Torrison and the Group Committee (pp. 4–5, *supra*). And, on June 25, when the Union asked petitioner to accept the agreement which the Group Committee had arrived at the preceding night, petitioner indicated its acceptance, subject to certain modifications, and fur-

had lost its majority by July 9 (Pet. 16) rests on sheer speculation, the Board having had no occasion to inquire into or make any finding on that issue.

ther negotiations commenced on that basis (p. 6, *supra*).

Nor is a different conclusion required by the fact that the authority of the Group Committee was circumscribed, in that any agreement which it reached with the Union was not binding on petitioner until ratified, while certain issues were reserved altogether for individual negotiation (Pet. 21–23). Subject to these limitations, which are not uncommon in group bargaining, petitioner authorized the Group Committee to act for it in negotiating an agreement. Accordingly, it is properly chargeable with any unlawful refusal to bargain which the Committee engaged in while acting in that capacity.[11]

(b) The Board's finding that petitioner, through the Group Committee, refused on June 20 to resume negotiations with the Union unless the Turtle Lake employees called off their strike is based on Union Representative Veleke's testimony, which the Board credited (J.A. 23; 185, 188), that, about midnight on June 19, the State mediator, who had been meeting with the Group Committee separately, relayed a message from Group Attorney Torrison that the "employer committee" would talk "if the men went back to work." Petitioner does not dispute that it is an unlawful refusal to bargain for an employer to condition further negotiations upon abandonment of a strike,[12]

[11] See *National Labor Relations Board* v. *Cement Masons Local No. 555*, 225 F. 2d 168, 173–174 (C.A. 9); *United Mine Workers* v. *Patton*, 211 F. 2d 742, 746 (C.A. 4).

[12] See *National Labor Relations Board* v. *Pecheur Lozenge Co.*, 209 F. 2d 393, 403–404 (C.A. 2), certiorari denied, 347 U.S. 953.

but it contends that Veleke's testimony is insufficient to establish that this occurred here because it was "hearsay" and, at best, only supports the inference that the Turtle Lake Cooperative Creamery, rather than the Group as a whole, was imposing the illegal condition (Pet. 19–20). As the testimony was admitted without objection, petitioner cannot now complain about its use by the Board.[13] Nor is there any justification for concluding that the Committee's conditional offer related only to the discussion of Turtle Lake's problems, since the last previous face-to-face bargaining between the Union and the Group Committee had involved issues common to all the employers, as did the next meeting when bargaining was resumed (pp. 4–5, *supra*); indeed, Turtle Lake signed the Group agreement, as soon as it was concluded (J.A. 30, 44; 176–181, 192).

(c) Contrary to petitioner's contention (Pet. 24–25), there was ample evidentiary support for the Board's finding that the Turtle Lake incident was at least one of the causes of the subsequent strike at petitioner's plant. Thus, the record shows that the strike at Turtle Lake was part of a Union plan to exert pressure on the members of the Group, one by one, to obtain a Group agreement (p. 4, *supra*). When, on June 20, the Group conditioned a resumption of negotiations on an illegal condition, *viz.*, call-

[13] See *Diaz* v. *United States*, 223 U.S. 442, 450; 1 Wigmore, *Evidence* § 18, pp. 321–325 (3d ed. 1940). Moreover, the mediator was apparently not available as a witness (J.A. 330), and petitioner never tendered any evidence which would contradict Veleke's testimony.

ing off the Turtle Lake strike, the Union, if it were to attain its objective, had little alternative but to intensify the pressure against the Group, and accordingly it struck petitioner. There was thus a direct causal connection between the refusal to bargain at Turtle Lake and the strike at petitioner's plant on June 22.[14] To be sure there may have been other reasons for the strike at petitioner's plant besides the June 20 unfair labor practice, but, under settled authority (see Pet. 5a–6a), these would not be sufficient to remove it from the category of an unfair labor practice strike.

3. Equally without substance is petitioner's final contention (Pet. 26–27) that it cannot be deemed to have discriminated against the strikers, since their application for reinstatement was not made in good faith but was solely for the purpose of qualifying for unemployment compensation. Both in their visit to the plant and in their subsequent letter, the strikers stated that they were ready and willing to return to work, without any conditions attached (pp. 10–12, *supra*). The mere fact that the employees may also have regarded this application as necessary to qualify them for unemployment compensation (J.A. 74–75; 315), or that they resumed their picketing after petitioner's secretary-treasurer told them to tender their application to two other officials who were not available, does not justify reading a qualification or an ulterior motive into the strikers' other-

[14] See the testimony of Union Representative Veleke quoted by the court below (Pet. 4a–5a) and note his further testimony at J.A. 187–188.

wise unequivocal offer. There is no basis for assuming that, had petitioner complied with its statutory duty to offer them reinstatement, the strikers would have rejected the jobs in favor of maintaining the picketing and perhaps receiving unemployment compensation.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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